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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

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No. .....

FREDERICK P. MUSTELL,
Petitioner,

v.

DR. FRANK A. ROSE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Alabama.

PETITION FOR WRIT OF CERTIORARI.

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FREDERICK P. MUSTELL,
Petitioner,

v.

DR. FRANK K. ROSE, Individually, and as President of the University of Alabama; DR. S. RICHARDSON HILL, Individually, and as Dean of the Medical College of Alabama; DR. WALTER B. FROMMEYER, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; DR. W. NICHOLSON JONES, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; DR. HERSCHEL BENTLEY, JR., Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; DR. GLENN H. BAIRD, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; DR. JAMES M. SUSSEX, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; DR. MARGARET KLAPPER, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; DR. BASIL I. HIRSCHOWITZ, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; DR JORGE A. LAZARTE, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; and DR. THOMAS B. PATTON, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Frederick P. Mustell, by his attorney of record, respectfully requests that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Alabama rendered on the 6th day of June, 1968.

OPINION.

The opinion of the Supreme Court of Alabama in question rendered on the 6th day of June, 1968, is reported at 211 So. 2nd 489. A full, true, and correct copy of the opinion and judgment thereon is appended hereto (Appendix "A", pp. 13-30).

JURISDICTION.

Jurisdiction of this court is invoked 28 U. S. Code, Section 1257 (3).

QUESTIONS PRESENTED

1. Does a student in a state supported medical college have any protection under the Fourteenth Amendment of the Constitution when his final grades have been arbitrarily, capriciously, and without just cause changed from that of a passing to that of a failure for the sole purpose of declaring him academically deficient?

2. Does a student in a state supported medical college have a constitutional right to be present and to be represented by counsel before a committee meeting regarding his dismissal from school as a result of an arbitrary and capricious act of a department head who changed his grades?

STATUTES INVOLVED.

Fourteenth Amendment, Constitution of the United States (Appendix "B", p. 30).

STATEMENT OF THE CASE.

Petitioner, a resident of the State of California, entered the Medical College of Alabama in Birmingham, Alabama, in September of 1961. He continued his studies and was promoted to the third year of the medical college in September of 1963. During his third year, his true and rightful grades as earned by him in his courses were as follows:

Preventive Medicine	B
Psychiatry	B
Pediatrics	C
Medicine	B
Surgery	B

The petitioner was taught by Dr. Thomas Patton in Surgery. During his third year, Dr. Patton gave him a grade of 81.9 as a final grade in Surgery. This was shown by Dr. Patton's grade book and final grades (Complainant's Exhibits Nos. 3, 4 and 5; R. 503-506). Petitioner was taught in Medicine by Dr. Buris Boshell. His final grade in Medicine was 81.6 (Complainant's Exhibits Nos. 9 and 10; R. 522-525). After the completion of his third year in the Medical College of Alabama, the Promotions Committee, composed of certain of the respondents, met to determine the students that were to be promoted to the Senior Class. The respondents, who constituted the Promotions Committee, met on May 28, 1964. At the Promotions Committee meeting, the Chairman, Dr. Champ Lyons, who was the head of the Department of Surgery, changed the grade as earned by the petitioner under the instruction of Dr. Patton from 81.5 or a B to 60 or a F (Complainant's Exhibit No. 5; R. 506). The petitioner was not allowed to be present at this meeting. The grade earned by the petitioner in Medicine was changed from a 82.5 to a 60 by the respondent, Dr. Walter B. Frommeyer, prior to said Promotions Committee meeting on May 28, 1964. As a result

of the failure of the petitioner in two major subjects, Medicine and Surgery, the Promotions Committee recommended that he be dismissed from the Medical College of Alabama.

After the petitioner's dismissal from the Medical College of Alabama, he attempted to secure a hearing before the Dean of the Medical College and the members of the Promotions Committee concerning the changing of his grades in Surgery and Medicine. He attempted to contact each one of the members of the Promotions Committee to secure a hearing. After all of these efforts had failed and after he had unsuccessfully attempted to gain admission to numerous medical colleges throughout the United States and Europe, he then filed a proceeding for a mandatory injunction in the Circuit Court of Alabama, Tenth Judicial Circuit, requiring the respondents to restore his changed grades in Medicine and Surgery from failing to passing and to reinstate him in the Medical College of Alabama. He averred in the Bill of Complaint that his grades in Surgery and Medicine had been arbitrarily, capriciously, and without just cause changed from a passing to a failing grade. Further, had his true and rightful grades in Medicine and Surgery been presented to the Promotions Committee meeting he would have been promoted to the Senior Class. He alleged that an actual justifiable controversy existed which affected substantial personal and property rights. Testimony was taken on the 9th day of May, 1966, and the court entered an Interim Decree (Appendix "C", pp. 31-33). This Interim Decree stated, **"that it was not denied that certain of the purported grades of the complainant during and at the conclusion of said meeting of the said Junior Promotions Committee were altered or changed from passing grades to failing grades."** The court in this Interim Decree required the respondents, who were members of the Junior Promotions Committee, to hold an additional meeting for

the purpose of reviewing the decision handed down by the Junior Promotions Committee meeting on May 28, 1964. However, this Interim Decree did not require the instructors in Surgery and Medicine to reinstate the passing grades that had been arbitrarily and capriciously changed. The petitioner was not allowed to be present at this meeting, nor was he allowed to have counsel present in his behalf although counsel requested that he be permitted to appear. As a result of the court's failure to require that his rightfully earned grades be reinstated, the Promotions Committee had the same facts before it as it had at the first meeting when the petitioner was dismissed from medical school in 1964. On May 24, 1966, the committee submitted to the court its written report of a review of the petitioner's medical record at the Medical College of Alabama. Based upon this report the lower court entered its Final Decree on the 24th day of May, 1966 (Appendix "D", p. 33). The petitioner from this decree of the lower court on the 25th day of May, 1966, appealed to the Supreme Court of the State of Alabama. The petitioner in his assignments of error in the Supreme Court of Alabama averred that the decree of the 25th day of May, 1966, denied him his constitutional rights under the Constitution of the United States of America and the Constitution of the State of Alabama. Among the other assignments of error, he averred that his grades in Medicine and Surgery were changed arbitrarily, capriciously, and without just cause. He argued in a brief submitted to the Supreme Court of Alabama that his constitutional rights were abridged. The Supreme Court of Alabama in its decision (Appendix A, pp. 19-20) did not discuss whether or not the petitioner's grades had been arbitrarily and capriciously changed, but decided that school authorities have absolute discretion in determining whether or not a student has been delinquent in his studies. The Supreme Court also decided in its opinion (Appendix A, pp. 29-30) that the petitioner did not have a constitutional right to

be present when a decision was being reached to dismiss him as a student for his failure to meet the required scholastic standards irrespective of the fact that his grades had been arbitrarily changed. In essence, the Supreme Court of Alabama decided that the head of a department had a right to determine a student's rightfully earned grades irrespective of whether or not that department head had actually instructed the student. This decision was in direct conflict with the evidence. Dr. Frank Rose, President of the University of Alabama, testified that only a faculty member that taught a particular student had a right to determine his final grade in a course (R. 49). Dr. Thomas Patton, the professor who taught your petitioner in Surgery, testified that he earned a numerical grade of 81.9 in Surgery (R. 81 through 90). Dr. Patton's testimony was supported by his grade book (Complainant's Exhibit No. 3; R. 503) and his calculation of the petitioner's final grade (Complainant's Exhibits Nos. 4 and 5; R. 504-506). His grades as earned by him in Medicine were changed from 81.6 to a 60 prior to the Junior Promotions Committee meeting. (Complainant's Exhibits Nos. 9 and 10).

The Supreme Court of Alabama in affirming the lower court's decision in essence determine that a department head had a prerogative to determine a student's grade regardless of whether or not that department head had ever instructed the student. The Supreme Court further decided that a student does not have a constitutional right of notice, presence, and representation of counsel when a decision is being reached to dismiss a student for failure to meet the required scholastic standards.

REASONS FOR GRANTING THE WRIT.

In recent years this enlightened court has pronounced in no uncertain terms that the constitutional umbrella of protection extends to people in all phases of life, including the indigent, the union member, the Negro, the illiterate, the teacher, the Communist, the juvenile, and the accused to cite a few. However, this Court has never defined the constitutional rights of a student at a state supported institution to receive an education without capricious and arbitrary interference from school officials. This is not a case involving the single issue of whether or not this petitioner's grades were changed from a passing to a failing grade, but embrace the rights of millions of students now attending colleges of higher learning and their successors. It can hardly be argued that a college education and particularly a medical degree is not an asset which should be afforded the protection of due process of law pursuant to the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of Alabama and all of the other decisions of higher state courts have long stood behind the theory that "a court does not interfere with the management of a school's internal affairs unless there has been a manifest abuse of discretion or where the school authorities have acted arbitrarily and unlawfully." However, these courts have never set up any procedures to guarantee the constitutional rights of the student under the due process clause of the Fourteenth Amendment of the Constitution of the United States, prior to dismissal. The Courts and institutions have long stood behind this crutch in denying students their constitutional rights to attend a college and to receive a degree provided it has been earned.

A similar situation arose in the case of **Thomas Connely, Jr. v. University of Vermont** and **State Agricultural College**, 244 Fed. Supp. 156 (1965). This was a case where a medical student was dismissed for his failure in Pediatrics-Obstetrics in the third year of medical college. The testimony revealed that the professor that taught this particular student determined in advance of his instruction that he intended to fail this student in this particular course. The court remanded this cause for further hearing on the student's dismissal as being arbitrary and capricious and stated as follows:

> "Where a medical student has been dismissed for a failure to attain a proper standard of scholarship, two questions may be involved; the first is, was the student in fact delinquent in his studies or unfit for the practice of medicine? The second question is, were the school authorities motivated by malice or bad faith in dismissing the student, or did they act arbitrarily or capriciously?" In general, the first question is not a matter for judicial review. However, a student's dismissal motivated by bad faith, an arbitrariness or capriciousnes may be actionable.
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> ". . . It has been said that courts do not interfere with the management of a school's internal affairs unless 'there has been a manifest abuse of discretion or where (the school officials') action has been arbitrary or unlawful,' **State ex rel. Sherman v. Hyman**, 180 Tenn. 99, 171 S. W. 2d 822, cert. den. 319 U. S. 748, 63 S. Ct. 1158, 87 L. Ed. 1703 (1942), or unless the school authorities have acted 'arbitrarily or capriciously', **Frank v. Marquette University**, 209 Wis. 372, 245 N. W. 125 (1932), or unless they have abused their discretion, **Coffelt v. Nicholson**, 224 Ark. 176, 272 S. W. 2d 309 (1954), **People**

ex rel. Bluett v. Board of Trustees of Illinois, 10 Ill. App. 2d 207, 134 N. E. 2d 635, 58 A. L. R. 2d 899 (1956), or acted in 'bad faith', **Barnard v. Inhabitants of Shelburne**, supra, and see 222 Mass. 76, 109 N. E. 818 (same case).

". . . The effect of these decisions is to give the school authorities absolute discretion in determining whether a student has been delinquent in his studies and to place the burden on the student of showing that his dismissal was motivated by arbitrariness, capriciousness or bad faith. The reason for this rule is that in matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other noneducational tribunals. **It is only when the school authorities abuse this discretion that a court may interfere with their decision to dismiss a student**" (P. 519-160).

However, this court nor any other court, including **Dixon v. Alabama Board of Education**, infra, has ever defined a student's constitutional rights prior to dismissal.

The only case which discussed the constitutional right of a student not to be arbitrarily dismissed from school was the case of **Dixon v. Alabama Board of Education**, 295 F. 2d 150 (5th Cir.), cert. denied 368 U. S. 930 (1961). In this case Judge Rives stated as follows:

"Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law. The minimum procedural requirements necessary to satisfy

due process depend upon the circumstances and the interests of the parties involved.

"Turning then to the nature of the governmental power to expel the plaintiffs, it must be conceded, as was held by the district court, that power is not unlimited and cannot be arbitrarily exercised. Admittedly, there must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement. The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case" (p. 157).

CONCLUSION.

This court should grant a Writ of Certiorari in this case in order to clarify the constitutional rights of a student to receive an education without the interference of arbitrariness or capriciousness on the part of anyone. The students that are enrolled in the colleges and universities are the frame work of our society in the next decade. Certainly these young citizens need the protection of this Court and the constitutional veil to protect actions such that have occurred in this case. The school authorities and instructors standing behind the previous decisions of the lower courts could summarily suspend a student for political reasons, religious reasons, or for personal reasons, and that suspension would be sustained. The students in our country need the assurance of the public, the institutions, and of this court that their rights as citizens are parallel to the other populous of this nation. In these uncertain times, certainly the young students need some assurance that their efforts when given to better themselves will not be in vain.

Therefore, for the foregoing reasons a Writ of Certiorari should be granted by this Court in this cause.

Respectfully submitted,

ROBERT C. BARNETT,
Attorney for Petitioner.

Certificate of Service.

I, Robert C. Barnett, the attorney-of-record for the petitioner, do hereby certify that I have mailed a copy of the foregoing petition to Messrs. Thomas, Taliaferro, Foreman, Burr & Murray, Suite 1130 Bank for Savings Building, Birmingham, Alabama and Honorable Rufus J. Bealle, University of Alabama, Montgomery, Alabama, attorneys-of-record for all respondents, by U. S. Mail, postage prepaid, this 22nd day of August, 1968.

.....
Robert C. Barnett.